

Cartels

Enforcement, Appeals & Damages Actions

Third Edition

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Switzerland

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Overview of the law and enforcement regime relating to cartels

The Federal Act of 6 October 1995 (revised in 2004) on Cartels and Other Restraints of Competition (hereafter referred to as “Cartel Act”) is the legislation governing cartels in Switzerland. The regulatory framework is completed by several federal ordinances, notices and communications of the Competition Commission (“Comco”). The Cartel Act is construed independently from EU competition law (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2012 and 2C_344/2010, pt 4.3). Therefore, the legislation and individual solutions diverge from EU case law and the EU Commission’s decision-making practice.

The purpose of the Cartel Act is to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. The objective is not limited to economic aspects: general interest considerations are also taken into account. The law grants the Comco the power to assess the economic consequences of restrictions of competition and concentrations between undertakings, and leaves it to the Swiss Federal Council (the Swiss government) to assess the balance with the general public interest. Upon request by the undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco may be authorised by the Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons.

The Cartel Act prohibits unlawful restraints of competition such as anti-competitive agreements or concerted practice. Anti-competitive agreements are defined as binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of production which have a restraint of competition as their object or effect (Art. 4 § 1 Cartel Act).

The Cartel Act is based on the principle of abuse. To be unlawful, an agreement must either eliminate effective competition or significantly impede effective competition without being justified on economic grounds.

In accordance with Art. 5 § 3 and 4 of the Cartel Act, the following horizontal and vertical restraints are presumed to eliminate effective competition and are thus considered as hard-core agreements: horizontal agreements that directly or indirectly fix prices, restrict quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners, as well as vertical agreements that set minimum or fixed prices or allocate territories to the extent that sales by other distributors into those territories are not permitted.

Authorities and enforcement regime

The authorities enforcing the Cartel Act are the Comco and its Secretariat. Based in Berne, the Comco consists of 12 members and is headed by a president and two vice-presidents. The majority of the Comco's members must be independent experts with no interest in or special relationship with any economic group whatsoever. The Comco takes decisions, remedial actions and sanctions against undertakings.

The Secretariat is empowered to conduct investigations and, together with a member of the Comco, to issue any necessary procedural rulings. The Secretariat submits draft decisions to the Comco and implements the latter's decisions. The total staff of the Secretariat amounts to more than 85 employees, a significant part of whom are economists.

Sanctions

Pursuant to Art. 49a of the Cartel Act, direct sanctions are imposed on undertakings that participate in a horizontal cartel or vertical restraints deemed to eliminate competition within the meaning of Art. 5 § 3 and 4 of the Cartel Act. In the *Gaba* case, the Federal Administrative Tribunal addressed for the first time the question – largely debated by commentators – whether a company can be sanctioned if the presumption of Art. 5 § 3 and 4 of the Cartel Act is reversed and the agreement merely restricts competition within the meaning of Art. 5 § 1 of the Cartel Act (*Gaba* case B-506/2010 dated 19 December 2013). The Federal Administrative Tribunal accepted the later solution and confirmed the fine of CHF 4.8m imposed on Gaba.

An undertaking condemned for unlawful agreement risks fines up to 10% of the turnover that it achieved in Switzerland in the preceding three financial years. The amount of the fine is dependent on the duration and severity of the unlawful behaviour and is calculated also by taking into account the likely profit that resulted from the unlawful behaviour. If the undertaking assists in the discovery and in the elimination of the restraint of competition, the fine may be waived in whole or in part. The Cartel Act Sanctions Ordinance (hereafter referred to as “CASO”) lays down the method of calculation of the fines.

Furthermore, an undertaking that violates an amicable settlement, a legally enforceable decision of the Comco or a judgment of the Federal Administrative Tribunal or the Federal Supreme Court, can be fined up to three times the profit generated from such non-compliance. If such profit cannot be calculated or estimated, the amount may not exceed 10% of the undertaking's most recent annual turnover in Switzerland.

Finally, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligation during an on-going investigation, can be fined up to CHF 100,000.

The Comco has wide decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify certain business practice.

Overview of investigative powers in Switzerland

The Secretariat is empowered to conduct investigations and, together with a member of the Comco, to issue any necessary procedural rulings. The Comco may hear the parties who have allegedly committed a violation or hear third parties as witnesses (such as competitors or suppliers), compel the parties to give evidence, and ask for statements (Art. 42 § 1 Cartel Act). The parties involved have the right to comment on the minutes of such proceedings.

The undertakings under investigation are obliged to provide the Secretariat with all the information required for their investigations and produce the necessary documents (Art. 40

Cartel Act). The competition authorities may use all kinds of evidence to establish the facts, such as documents, information supplied by third parties, testimony and expert opinions.

Upon request of the Secretariat, the president or each vice-president of the Comco may order inspections and seizures (Art. 42 § 2 Cartel Act). The Federal Act on Criminal Administrative Law applies by analogy to such proceedings. The notice published by the Secretariat on its procedure during inspections indicates that undertakings subject to an inspection have the right to be assisted by external lawyers who will, however, not be considered as contact persons. Only the CEO or the most senior representative will be considered as a contact person. The representatives of the Secretariat in charge of the inspection will not wait for the arrival of the external lawyers before starting to search the premises or seizing documents and electronic data. Any evidence discovered while external lawyers are not present will be set aside. Once the external lawyers have arrived on the premises, the collected evidence may be screened by the lawyers who can comment on its content and, if necessary, ask for it to be sealed.

Overview of cartel enforcement activity during the last 12 months

Dawn raids

Since the entry into force on 1 April 2004 of an amendment to the Cartel Act allowing the authorities to conduct dawn raids, the Secretariat conducted almost 100 dawn raids in the framework of 20 investigation procedures.

In the last 12 months, the Comco announced nine dawn raids conducted before the opening of an investigation in the car leasing sector, as well as around ten dawn raids in the framework of other investigations.

On 15 October 2013, the Secretariat opened the “See Gaster” construction investigation into various companies operating in the sector for road, civil engineering and building construction, and had to conduct various inspections. This investigation was extended on 21 October 2013 to other companies at which dawn raids were also carried out.

On 15 July 2014, the Comco announced the opening of an investigation against nine companies active in the car leasing sector. Dawn raids were conducted at those companies. The companies, which are owned by car manufacturers and known as “captive banks”, are accused of fixing vehicle leasing rates through a series of agreements with competitors.

Ongoing investigations

Pursuant to the Comco, around ten cartel investigations are believed to be ongoing at present (horizontal and vertical restraints to competition). The Comco is conducting various investigations in the following markets and/or sectors: the market for hearing devices; the financial services sector; the road construction and civil engineering area; the tourism sector; the market for manufacturing and importation of musical instruments; the telecommunication services sector; and the broadcasting of live sport market.

In October 2013, the Comco opened an investigation against several road construction and civil engineering companies in the Canton of St-Gallen, the “See Gaster” cartel, and conducted dawn raids at the premises of the companies concerned. The Secretariat had indications that these had made arrangements to coordinate the award of contracts and to allocate construction projects and customers.

Concerning the investigation against domestic car dealers over alleged anti-competitive practices in the sale of vehicles made by Volkswagen Group opened by the Comco in May 2013, an amicable settlement was concluded with the leniency applicant, as announced by

the Comco on 18 August 2014. The procedure is closed against the leniency applicant but the Comco continues to investigate four other dealers that allegedly colluded to fix the prices and discounts offered on new Volkswagen Group cars. It is the first time that the Comco accepted a leniency application in the middle of the investigation. This is an important change of policy by the Comco as parties have to pay for the costs of the investigation and these can be onerous, sometimes exceeding the fine.

On 31 March 2014, the Comco opened the formal investigation against UBS, Crédit Suisse, Zürcher Kantonalbank, Julius Baer as well as foreign banks JPMorgan Chase & Co, Citigroup Inc., Barclays Bank plc and Royal Bank of Scotland Group plc, which supposedly colluded to manipulate the foreign exchange market. The Comco indicated that there is evidence that those banks exchanged sensitive information relating to foreign exchange trading aimed at manipulating the WM/Reuters benchmark. On 11 November 2014, the Swiss Financial Market Supervisory Authority concluded enforcement proceedings against UBS AG regarding foreign exchange trading conduct in Switzerland and imposed a fine of CHF 134m.

On 15 July 2014, the Comco announced the opening of an investigation against nine companies active in the car leasing sector. The companies, which are owned by car manufacturers and known as “captive banks”, are accused of fixing vehicle leasing rates through a series of agreements with competitors.

Final cartel decisions

Three final cartel decisions were issued in the last 12 months by the Comco. The total amount of fines imposed on parties amounts to around CHF 38m for the last 12 months, and the highest individual cartel fine imposed amounts to CHF 4m. The Comco’s decisions are currently under appeal before the Federal Administrative Tribunal.

On 22 April 2013, the Comco rendered its decision on the construction bid rigging case in the canton of Zurich, and fined 12 construction companies for a total amount of around CHF 10.5m. One company benefited from a complete exemption from sanctions due to a leniency application and full cooperation. The investigation was opened in 2009 on the basis of a leniency application. This decision confirms the fact that the fight against bid rigging cartels is a priority for the Comco.

On 27 May 2013, the Comco decided to fine ten books distributors located in French-speaking Switzerland because of illegal restrictions on parallel imports. The distributors prevented the Swiss retailers from importing books at a lower price, mainly from France between 2005 and 2011. The sum of the fines amounted to about CHF 16.5m. The Comco declared that this decision was of particular importance, as it embodied its fight against the partitioning of the Swiss market.

Finally, on 2 December 2013, 11 companies active in the airfreight sector were fined by the Comco for a total amount of fines of CHF 11m. The fines relate to flights between Switzerland and countries outside the EU. EU flights were covered by the EU Commission decision, which fined 11 airlines €799m, currently under appeal. The decision of the Comco held that in the air freight transport sector, major international air freight forwarders coordinated their activities between 2003 and 2007 in relation to certain fees and surcharges. For the first time, the Comco applied the concept of a “single complex and continuous infringement”. It was also the first time that the Comco had to apply and to consider the bilateral agreement between the EU and Switzerland on air transport. The Comco considered both Swiss and EU law when analysing the infringements, though the fines were calculated according to Swiss law alone. The various companies have appealed against the decision of the Comco.

We should note that almost one year after the decision was rendered by the Comco, the decision has still not been published by the latter. This could be a sign of a change in practice by the Comco, as it usually always publishes its decisions a couple of months after the publication of the corresponding press releases.

The Federal Administrative Tribunal rendered a few interesting and important decisions in the last 12 months. On 3 December 2013, the Federal Administrative Court overturned a decision against three pharmaceutical companies for vertical price-fixing in drugs used to treat erectile dysfunction. The Federal Administrative Court annulled fines of CHF 5.7m on Pfizer, Bayer and Eli Lilly. In 2009, the Comco had found that the three companies separately fixed the prices of anti-impotence drugs Viagra, Cialis and Levitra by issuing illegal public price recommendations which were followed by a majority of drug stores and physicians. But the Federal Administrative Court said the Comco had not sufficiently taken into account the consequences of the ban on publicly advertising the products as well as the “shame factor” related to those products. Hence, the advertising ban and the “shame factor” prevented any intra-brand competition on this market. The Federal Administrative Court held that the Cartel Act could therefore not apply in this particular case. The Comco has lodged an appeal against that decision before the Federal Supreme Court.

On 19 December 2013, the Federal Administrative Court confirmed Comco’s decision against the company Gaba. In November 2009, the Comco had imposed a fine of CHF 4.8m on Gaba for restricting passive sales of Elmex toothpaste in Switzerland. The Federal Administrative Court considered that the provisions of the licence agreement between Gaba and its Austrian distributor was an unlawful vertical agreement leading to an absolute territorial protection of the Swiss market. Gaba lodged an appeal before the Federal Supreme Court. In its precedent-setting decision, the Federal Administrative Tribunal also found that a contractual ban on exports from a European territory qualifies as a vertical hard-core restriction and is subject to fines regardless of the effect of the specific restriction on competition. Vertical hard-core restrictions are – by their very nature – agreements that affect competition significantly, regardless of a quantitative assessment of the effects on the Swiss markets. As already mentioned, the decision of the Federal Administrative Tribunal is of particular importance as, should it be confirmed by the Federal Supreme Court, the scope of the restrictions by object of Art. 5 § 3 and 4 of the Cartel Act would be much extended. The decision of the Federal Administrative Tribunal very much surprised the “Swiss antitrust community”.

The Federal Administrative Tribunal also rendered its decision on the window mountings case (B-8399/2010, B-8404/2010 and B-8430/2010 dated 23 September 2014). The Federal Administrative Tribunal decided in favour of the three companies that had appealed against the decision of the Comco dated 10 October 2010, and therefore annulled the sanctions imposed by the Comco. The Federal Administrative Tribunal held that there was a reasonable doubt as regards the involvement of the companies in the alleged horizontal agreement on prices for window mountings. As sanctions imposed on the basis of the Cartel Act are considered as criminal law sanctions, the Federal Administrative Tribunal held that the general principle of the presumption of innocence provided by criminal law shall also apply to proceedings and decisions against companies that have supposedly breached Swiss competition law.

Key issues in relation to enforcement policy

Investigations under the Cartel Act are two-staged procedures consisting of a first stage preliminary investigation that may be followed by a second stage in-depth investigation.

Nevertheless, the Comco may open an in-depth investigation even without going through a preliminary investigation. The Secretariat can initiate preliminary investigations either on its own initiative, at the request of certain undertakings concerned (for example, competitors) or based on information received from third parties (complaints). It is at the discretion of the Secretariat to open a preliminary investigation. If the Secretariat concludes that there are indications of significant impediment of effective competition, an investigation will be opened, provided a member of the Comco's presiding body consents. The Secretariat must open an investigation if asked to do so by the Comco or by the Department of Commerce of the Swiss government.

On 14 April 2014, the Comco published its 2013 annual report and announced that the freedom to set prices and market foreclosures will continue to be its permanent priorities. The Comco specifically expressed concerns about market foreclosures, because they are very harmful and reduce the competitive pressure from abroad on prices, thus helping to ensure that Switzerland remains a "high price island". Regarding the Comco's fight against any contractual provisions or measures aimed at foreclosing the Swiss market, the Swiss federal government proposed to revise the Federal Act to support the Comco's campaign against horizontal and vertical hard-core restrictions on competition. *Inter alia*, the proposed amendments to the Cartel Act shall: (i) ease the Comco's burden of proof in cases of horizontal or vertical hard-core restrictions by abolishing the possibility to rebut the presumption of a significant restriction on competition; and (ii) improve compliance by reducing fines imposed on companies that have implemented effective competition compliance programmes. The proposed amendments to the Cartel Act were however definitely rejected by the Federal Parliament on 19 September 2014.

Since summer 2011, during which the Swiss franc reached its highest level, the Comco repeatedly stated that any restriction of parallel imports and passive sales, as well as any resale price maintenance, will be held unlawful. The Comco has investigated a significant number of cases involving restrictions to parallel imports. Indeed, in the last few years, the Comco has been acting aggressively against any prevention or restriction of parallel and direct imports. Hence, since 2009, the Comco has acted against the following companies:

- *Gaba*: CHF 4.8m fine for restricting parallel imports of Elmex toothpaste (November 2009). The fine was confirmed by the Federal Administrative Tribunal on 19 December 2013;
- *Nikon*: CHF 12.5m fine for restricting parallel imports of cameras and lenses (November 2011);
- *Electrolux/VZug*: decision prohibiting clauses banning online sales of home appliances (July 2011);
- *BMW*: CHF 156m fine for restricting direct and parallel imports of cars (May 2012);
- IFPI Switzerland and Phononet AG: respectively CHF 3.5m and CHF 20,000 fine for restricting parallel imports of phonograms and/or videograms (July 2012);
- *Altimum SA*: CHF 450,000 fine for restricting parallel imports of sports goods (October 2012); and
- *10 books distributors* (French-language books): CHF 16.5m total amount of fines for restricting direct and parallel imports of books.

To date, seven out of nine completed investigations regarding vertical hard-core restrictions led to fines. In the *French-language books*, *Altimum*, *BMW*, *Nikon* and *Gaba* cases, appeals against the Comco's decisions are pending.

In a press conference, the Comco indicated that since the entry into force of the revision of the Cartel Act on 1 April 2004, it frequently made use of the possibility to conduct dawn

raids, to accept leniency applications and to impose sanctions. In the Comco's opinion, these new means have strengthened its capacity to implement the Cartel Act. Hence, since 2004, the Comco has received 50 leniency applications, conducted 91 dawn raids within the framework of 18 investigations and rendered 23 decisions, imposing sanctions against 97 undertakings in total.

Key issues in relation to investigation and decision-making procedures

In Switzerland, the issue of how decisions are reached is a subject of significant debate. As outlined above (see paragraph 1), the authorities enforcing the Cartel Act are the Comco and its Secretariat. Formally, the Secretariat is in charge of the investigations and the decision itself is not issued by the Secretariat, but by the Comco. Accordingly, the investigating and decision-making bodies are separate. However, the Comco is involved in various ways in the investigations. For instance, the Secretariat conducts the investigation, but the Comco has the power to hold hearings, a power it has made frequent use of in the recent past. Moreover, it is the Comco which decides on the opening of an in-depth investigation, or on the conduct of dawn raids.

Concerns were also raised as regards institutional autonomy, especially since sanctions are available under Swiss law. Sanction under Swiss competition law is an administrative sanction but would probably be considered as a criminal sanction in the meaning of Art. 14 of the UN Covenant II and 6 ECHR. Hence, an investigation opened on the basis of a hard-core agreement within the meaning of Art. 5 § 3 and 4 and 7 of the Cartel Act should respect all the procedural rights contained in Art. 14 of the UN Covenant II and 6 ECHR on the right to a fair trial. Pursuant to Art. 6 § 1 ECHR, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (see also decision of the Federal Supreme Court in the *Publigroupe* case 139 I 72). In light of the case law of the ECHR and of the functioning of the Comco and the Secretariat, the Comco cannot be considered as an independent and impartial tribunal but shall be qualified as an extra-parliamentary commission that monitors the market and whose works influence the economy. An appeal on full merits must be available against the Comco's decisions in order for the system established in the Cartel Act to safeguard and to respect the fundamental requirements of the right to fair trial. The Federal Administrative Court is an independent and impartial tribunal that is empowered to review the Comco's decisions on appeal, on the facts and on the law. The control performed by the Federal Administrative Tribunal shall be considered as the counterweight to the unclear, dichotomous system established by the Cartel Act. As regards procedural rights during the preliminary and the in-depth investigations, they can be outlined as follows:

- The preliminary investigation is intended to determine whether a further investigation is necessary. The decision to open an investigation is not a formal decision and cannot be appealed. Therefore the Administrative Procedure Act does not apply during the preliminary investigation made by the Secretariat and the parties concerned have no procedural rights; that is to say no right to consult files or records and no right to be heard. By the same token, third parties have no right to demand that the Secretariat opens an investigation.
- After the preliminary investigation and provided that there are sufficient elements, the Secretariat must, by means of an official publication, announce the opening of an in-depth investigation. Such announcement must state the purpose of the investigation and the names of the parties involved. Furthermore, affected third parties have the

possibility to join the investigation, albeit with limited procedural rights, upon a corresponding request made within 30 days of the announcement. All parties to the investigation are vested with the usual procedural rights contained in the Administrative Procedure Act provided, unless the Cartel Act stipulates otherwise (Art. 30 Cartel Act). They may consult files and suggest witness statements, and have the right to be heard and to participate in hearings. On the basis of this investigation, the Secretariat drafts and brings forward a motion for a decision. The parties and participating third parties may comment on the motion. If important new facts emerge, another round of hearings and witness statements may take place.

Neither the Comco nor the civil courts are required to undertake an investigation and reach a final decision within a specified period of time. There are no statutory time limitations applying to investigations. As an indication, a preliminary investigation can take from one to several months, and a formal investigation nine months to two years or more. However, an appeal can always be lodged in case of undue delay in a civil or in an administrative procedure (Art. 319 of the Federal Civil Procedure Code and Art. 46a of the Administrative Procedure Act).

The approach of the Secretariat during dawn raids as regards seizure of documents is reflected in its notice on its procedure during dawn raids. The notice on the procedure of the Secretariat during dawn raids mainly states that all documents exchanged with lawyers, irrespective of the location where the documents are kept in custody, are legally privileged to the extent they concern the professional representation of the party. The scope of that practice has been reinforced and extended by the entry into force on 1 May 2013 of a new provision regarding attorney client privileges (Art. 40 Cartel Act *in fine*). If sealing of such documents is requested by reference to legal privilege, the Secretariat may nevertheless briefly review the respective documents. Advice from in-house counsel is not legally privileged.

Trade secrets such as know-how, a list of business clients, or financial accounting documents, are specifically protected during the taking of evidence. The parties may request the non-disclosure of documents or censor trade secrets. However, should the Comco not consider some information as trade secrets although the parties request their non-disclosure, the Comco can render a decision in this regard in order to force the undertaking to disclose the documents. The parties can be forced to waive legal privilege over these documents. The non-disclosure of documents covered by trade secrets can be an issue as regards the right to be heard of the other parties. Therefore, parties are sometimes requested to provide ranges concerning information covered by trade secrets, such as the turnover, number of sales etc.

In the framework of a civil claim, pre-trial discovery is not available in Switzerland. During proceedings, a party can request from the court the issuance of documents which are in the possession of the counterparty or of a third party (Art. 160 § 1 lit. b of the Swiss Civil Procedure Code, hereafter referred to as “CCP”). However, this possibility may be of limited use since it presupposes an adequately substantiated description of the documents by the claimant. Furthermore, it is worth mentioning that third parties – and to a limited extent also the counterparty – can refuse the issuance of documents to the court, provided that they have the right to refuse to provide such information (Art. 163, 165 and 166 CCP). There is a right to appeal against a procedural decision (interim decision) before the final decision on infringement has been taken, should this be in the framework of an administrative procedure, or of a civil procedure.

Under Swiss law, there is no provision for procedural disputes to be dealt with by an independent officer, akin to the Hearing Officer within the EU system.

Leniency/amnesty regime

Leniency is an important aspect of enforcement in Switzerland. However, cartels are also discovered in other ways, for example on the Comco's own initiative, and investigation or through third party complaints. As the leniency programme has been available since 1 April 2004, there are only a few final decisions dealing with the leniency programme. It is therefore rather difficult to assess courts' review and control of the application of the leniency policy. The Comco indicated on 14 April 2014 that it had received 50 leniency applications since 1 April 2004. The practice shows that around two thirds of the cartels are successfully prosecuted by the Comco without a leniency applicant. Concerning the obligations imposed on a leniency applicant (for instance, to cooperate fully with the investigation), they are considered to be fair and proportionate.

The leniency programme applies to restrictive agreements that are prohibited and subject to fines because they contain hard-core clauses as well as a hard-core horizontal agreement within the meaning of Art 5 § 3 and 4 of the Cartel Act (Art. 49a § 2 Cartel Act).

Pursuant to the Ordinance on Sanctions, the Comco grants immunity from fines if an undertaking is the first to either: (i) provide information enabling the Comco to open an in-depth investigation pursuant to Art. 27 of the Cartel Act and the Comco did not have, at the time of the filing of the leniency application, sufficient information to open a preliminary or an in-depth investigation within the meaning of Art. 26 and 27 of the Cartel Act; or (ii) submit evidence enabling the Comco to prove a hard-core horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity from fines and that the Comco did not have, at the time of the filing of the leniency application, sufficient evidence to find an infringement of the Cartel Act in connection with the alleged hard-core horizontal or vertical agreements.

However, immunity from fines will not be granted if the undertaking: (i) coerced any other undertaking to participate in the infringement and was instigator or leader of the cartel; (ii) does not voluntarily submit all information or evidence in its possession concerning the unlawful practice in question to the Comco; (iii) does not continuously cooperate with the Comco throughout the procedure without restrictions and without delay; or (iv) does not cease its participation in the infringement of competition voluntarily or upon being ordered to do so by the Comco.

Pursuant to the Cartel Act, total immunity is limited to the "first in". Hence, going in second will not allow total exemption from a fine, but it may be an element of discharge with a view to obtaining partial immunity. A reduction up to 50% is available at any time in the procedure to an undertaking that does not qualify for full exemption, and can be granted to several undertakings involved in the same activity. The Ordinance on Sanctions does not provide any sliding scale of leniency. However, the Comco recently stated that the reduction of fine may be subject to a sliding scale (for example, the second applicant qualifies for 30% to 50% reduction, the next applicant for 20% to 30% reduction and so on). Further, the amount of the fine can be reduced up to 80% if an undertaking provides information to the Comco about other hard-core restraints of competition within the meaning of Art. 5 § 3 and 4 of the Cartel Act, and such hard-core restraints of competition were unknown to the Comco at the time of the disclosure (Art. 8 § CASO) (leniency plus). This reduction is without prejudice to any possible full exemption or partial reduction of fines for the newly disclosed cartel.

The Cartel Act does not expressly regulate the possibility for the Comco to withdraw immunity or leniency after it has been granted in a final decision. However, general

principles of administrative procedure law usually enable administrative authorities to withdraw or amend final decisions (including final decisions in relation to full immunity or leniency) under certain circumstances, for example if: (i) additional circumstances are discovered that justify withdrawal or amendment; and/or (ii) a final decision is unjustified. There is no specific case law concerning leniency withdrawal.

It is always important to approach the Secretariat at an early stage, especially as according to Art. 49 § 3 of the Cartel Act no fine will be imposed if the undertaking itself files the restraint of competition with the authority before it produces any effects. The timing of cooperation is one of the factors determining the amount of reduction. The Secretariat conducts a full review of leniency applications in chronological order of receipt (provided that they are valid) to determine precedence for full immunity. The Secretariat will confirm receipt of the notification and inform the applicant of the time of receipt. The leniency application will be viewed less favourably if the evidence was already provided by other undertakings.

While applying for leniency, one should take into account that leniency applicants are not protected from litigation based on an earlier infringement decision by the Comco (follow-on litigation). However, the Comco is under no express legal duty to cooperate and provide judicial assistance to civil courts. It may thus refuse to grant access to documents produced by, and detrimental to, leniency applicants. To date, the Comco has not disclosed documents submitted by leniency applicants to civil courts. The protection of leniency applicants from follow-on private litigation is one of the objectives of the Comco, which justifies oral submissions by leniency applicants and restricts the right of access to files for the other members of the cartel (see Art. 9 § 1 of the CASO). This objective was clearly stated in a recent decision of the Comco, whereby it held that the other concerned parties to an investigation have the right to consult documents submitted by leniency applicants only at premises, and denied such concerned parties the right to make photocopies (RPW/DPC 2012/2, p. 215, *Wettbewerbsabreden im Strassen-und Tiefbau im Kanton Aargau*).

At the international level, the recent Agreement between Switzerland and the European Union concerning cooperation on the application of their competition laws, which has entered into force on 1 December 2014, provides that information obtained under leniency or settlement procedures must not be exchanged if the undertakings concerned have not agreed to the exchange.

Administrative settlement of cases

Administrative settlement is a feature of the enforcement regime in Switzerland. During the preliminary investigation, the Secretariat may propose measures to eliminate or prevent restraints of competition (Art. 26 al. 2 Cartel Act). In the framework of an in-depth investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose an amicable settlement on the undertakings involved concerning ways to eliminate the restraint for the future (Art. 29 al. 1 Cartel Act). The amicable settlement shall be formulated in writing and approved by the Comco (Art. 29 al. 2 Cartel Act). The Comco shall either approve or refuse an amicable settlement but is also entitled to amend the amicable settlement proposed by the Secretariat. However, the Comco has amended a proposed amicable settlement only once, namely by setting a time limit to the amicable settlement (RPW/DPC, 2006/1, *Kreditkarten/Interchange Fee*, p115). An amicable settlement is binding on the parties and the Comco and may give rise to administrative and criminal sanction in case of a breach of any of its provisions by the parties. By signing the amicable settlement, the undertakings renounce the right to appeal the final decision and thus accept the proposed fine.

Concerning infringements to competition leading to direct sanctions (Art. 5 § 3 and 4 and Art. 7 Cartel Act), reaching an amicable settlement does not rule out fines in respect of infringements that took place before the amicable settlement's conclusion. Therefore, the Comco may approve an amicable settlement and at the same time impose sanctions. Such cooperative attitude from the undertakings can be considered as a mitigating factor (Art. 6 CASO). The practice of the Comco shows that a fine is in general reduced from 10% to 40%, depending also on other factors such as the duration of the illegal conduct or the cooperative attitude of the undertaking in the investigation. For more details concerning the calculation of fines and mitigating factors such as amicable settlements, see hereunder the "Civil penalties and sanctions" section.

The Secretariat will always try to reach an amicable settlement with the parties provided the conditions are met. The practice shows that amicable settlements are often concluded between the parties and the Comco. In the very recent case *Jura*, decision of 30 June 2014, the Comco approved the amicable agreement that was proposed by the Secretariat. Whilst the exact terms of the settlement have not been released, it is known that Jura Elektroapparate AG has committed to allow, in principle, its authorised dealers to trade online.

Third party complaints

Third parties have two ways of complaining about suspected cartel arrangements.

The first way is a complaint to the Secretariat (Art. 26 Cartel Act). It is at the sole discretion of the Secretariat whether to open a preliminary investigation, and third parties have no rights to demand that the Secretariat opens an investigation. The decision to open a preliminary investigation or not is not a formal decision and it cannot be appealed. If the Secretariat does open a preliminary investigation, third parties do not have any rights to consult files. If, after examining a complaint, the Secretariat decides not to pursue a complaint, it usually informs the parties about the reasons leading to such decisions. If the Secretariat concludes that there are indications of an unlawful restraint of competition, the Secretariat shall open an in-depth investigation in consultation with a member of the presiding body of the Comco, and give notice by way of official publication (Art. 27 and 28 of the Cartel Act). This publication invites third parties to come forward within 30 days if they wish to participate in the investigation. Third parties that announce themselves acquire the status of parties in the procedure and therefore have access to the file.

It must be noted that the numbers of third parties' complaints lodged by the Comco significantly increased in 2011. In the context of the significant appreciation of the Swiss franc against the US dollar and the euro in Summer 2011, consumer protection associations launched a vigorous campaign claiming that only small part of manufacturers' currency gains were passed on to Swiss, and accusing Comco of not cracking down on such practices. The Comco reacted by publicly calling on Swiss consumers to file complaints with Comco if they suspected that a manufacturer has restricted parallel imports in order to protect its currency gains. Supported by a media campaign and a number of political proposals, the Comco's public call resulted in 270 complaints being filed with it from mid-July 2011 to the beginning of October 2011, while in earlier years a total number of 300 complaints would have been filed in an entire year. However, the Comco reminded the public that the Cartel Act does not prevent manufacturers or importers from keeping currency gains for themselves, and that the Comco can act only against unlawful agreements pursuant to Art. 4 and 5 of the Cartel Act. Furthermore, the Secretariat formed a task force of four staff members who were to examine and process the complaints.

The second way for a third party affected by a cartel is to sue in front of a civil court for damages. Under Art. 12 of the Cartel Act, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request from the courts:

- the elimination of, or desistance from the hindrance;
- damages and satisfaction in accordance with the Code of Obligations; or
- the surrender of unlawfully earned profits in accordance with the provisions on agency without authority. Hindrances of competition include in particular the refusal to deal, and discriminatory measures.

Claims against competition restrictions can be also found in Art. 28 of the Swiss Civil Code (hereafter referred to as “CC”). Art. 28 CC protects personality rights, including economic rights. The applicant may ask the court to prohibit a threatened infringement, to order that an existing infringement cease, or to make a declaration that an infringement is unlawful if it continues to have an offensive effect.

Besides the Cartel Act, the Swiss Federal Law against Unfair Competition (“the Unfair Competition Act”) is also pertinent for private antitrust actions. According to Art. 9 of the Unfair Competition Act, whoever suffers or is likely to suffer prejudice to his clientele, his credit or his professional reputation, his business or his economic interests in general through an act of unfair competition may request the courts:

- to prohibit an imminent prejudice;
- to remove an on-going prejudice; or
- to establish the unlawful nature of a prejudice if the consequences still subsist. He may, further, institute proceedings for damages and redress, and may also require the surrender of profits in accordance with the provisions on agency without authority.

The actions should be brought before the higher civil cantonal courts. As was the case in the past, the new CCP, in force as of 1 January 2011, requires cantons to designate one court having sole cantonal jurisdiction for disputes related to the Cartel Act and to the Unfair Competition Act. The ‘single cantonal court’ has exclusive jurisdiction to order interim measures. The parties are exempted from filing an ordinary prior compulsory conciliation procedure. Concurrently with the Cartel and Unfair Competition Acts, the plaintiff may base its claim on other legislation and present it before the single cantonal court. The respondent may, however, only bring counterclaims falling under the jurisdiction of the same single cantonal court.

Civil penalties and sanctions

From a civil point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question. Although generally accepted in the actual doctrine, it has not yet been confirmed that the nullity of the agreements applies *ex tunc*.

From an administrative point of view, any undertaking participating in an unlawful agreement pursuant to Art. 5 § 3 and 4 and Art. 7 of the Cartel Act may be charged up to 10% of the turnover generated within Switzerland in the preceding three financial years (Art. 49a § 1 of the Cartel Act). This sanction is an administrative sanction but is considered as a criminal sanction in the meaning of Art. 14 of the UNO Pact II and 6 ECHR (B8399/2010, B-8404/2010 and B-8430/2010 dated 23 September 2014).

Pursuant to Art. 5 § 3 and 4 of the Cartel Act, the law provides for a rebuttable presumption that certain hard-core restrictions eliminate effective competition. In this regard, it remains unclear to what extent the Comco could impose an administrative fine on an undertaking

participating in an unlawful hard-core agreement within the meaning of Art. 5 § 3 and 4 of the Cartel Act but which would have succeeded in reversing the presumption that hard-core restrictions eliminate effective competition. Concerning sanctions for abuse of a dominant position, the Federal Administrative Tribunal, referring to Art. 7 ECHR, distinguishes between practices falling within the list of Art. 7 § 2 Cartel Act and those covered by the general clause of Art. 7 § 1 Cartel Act: only the former are liable to be sanctioned with a fine, because the general clause does not offer sufficient legal certainty to undertakings. The pertinence of this distinction is not yet confirmed by the Federal Supreme Court, but it is expected that the Comco will base its decisions on one of the examples of Art. 7 § 2 Cartel Act.

The amount of the fine depends on the duration and severity of the unlawful conduct. The company's turnover is calculated by analogy with the rules on the calculation of turnover in mergers (Art. 4 and 5 of the Merger Control Ordinance, hereafter referred to as "MCO") and encompasses the consolidated turnover. The base amount is up to 10% of the consolidated turnover generated on the relevant markets in Switzerland in the previous three business years, depending on the type and severity of the infraction (Art. 3 CASO). The "normal" profit that resulted from the unlawful behaviour is taken into account in the base amount. The relevant market includes product market and geographical market. The product market comprises all products and services that potential partners of the exchange regard as substitutable because of their characteristics and the purpose for which they are intended; the geographic market comprises the area in which potential partners of the exchange are engaged in both supply or demand side for products and services in the product market. The explanation above regarding the calculation of the turnover by analogy with the rules on the calculation of turnover in mergers is applicable. In recent price fixing cases, the Comco applied a percentage between 5% and 7% for the base amount. The base amount will be increased by up to 50% if the agreement was operational for up to five years. Each additional year will lead to an increase of another 10%. In practice, the Comco increased the base amount by 10% for each year of duration.

This amount may increase by a certain percentage reflecting aggravating factors, such as recidivism, high cartel gains, obstruction of justice, ring leader and measures to enforce cartel discipline (Art. 5 CASO). The law is not exhaustive and other factors could be taken into account. In particular, Swiss law does not fix the percentage of each aggravating factor but gives the Comco room to decide, depending on the circumstances of each particular situation. Practice has shown that the Comco does not retain aggravating factors in every case. In the recent case of bid rigging in the road construction sector in Aargau, where aggravating factors were taken into account, the increase sometimes went up to 200% in connection with the number of infringements in case of tenders where competitors were coordinating their prices (RPW/DPC 2012/2, p. 215, *Wettbewerbsabreden im Strassen- und Tiefbaud im Kanton Aargau*).

The amount may decrease by a certain percentage reflecting mitigating factors. Examples of mitigating factors are: immediate termination of the illicit behaviour after the Comco has taken first steps; passive role in the cartel; or desisting from taking cartel enforcement measures. The percentage of aggravation of each factor is not set by the law (Art. 6 CASO). In certain exceptional cases, the Comco may take into account as a mitigating factor that no profit was obtained from the unlawful conduct. The Comco does not always retain mitigating factors. In recent cases the percentages varied from 10% to 60% depending on whether the companies fully collaborated, immediately ceased their unlawful practices, or concluded an amicable agreement with the Comco. Reaching an amicable settlement can

also be considered as a mitigating factor (Art. 6 CASO). However, the Comco takes very much into account the moment of the amicable settlement. In a case of late settlement, the Comco only reduced the sanction by 3% (RPW/DPC 2010, p. 765, *Fensterbeschlage*), and announced that it will not reduce fines if the amicable settlement is signed after the second draft decision of the Secretariat. Concerning leniency, which will also be taken into account for the calculation of the fine, see the paragraph hereinabove, “Leniency and amnesty regime”.

The undertaking usually liable for the payment of the fine is the receiver of the decision. In a group of companies, should the subsidiary be effectively controlled by the parent company, it is the parent company that will be considered liable for the payment of the imposed fine. In the very recent BMW decision, the Comco reaffirmed this point by imposing the total fine on the parent company BMW AG in Germany and not BMW Switzerland. The Federal Supreme Court confirmed that practice in the *Publigroupe* case, where only the parent company was addressee of the decision and none of the five wholly owned subsidiaries (139 I 72 c. 1 and 3).

Right of appeal against civil liability and penalties

Decisions of the Comco and, to a limited extent, also interim procedural decisions, can be appealed to the Federal Administrative Tribunal. An appeal can be lodged on the following grounds: (i) wrongful application of the Cartel Act; (ii) the facts established by the Comco were incomplete or wrong; or (iii) the Comco’s decision was unreasonable (this claim is rarely invoked in practice). Hence, the appeal before the Federal Administrative Tribunal is a “full merits” appeal on both the findings of fact and law.

The addressees of the decision have the right to appeal, whereas it is uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether third parties are affected by the Comco’s decision. Usually this is true if a third party is significantly affected in its market activity by the anti-competitive agreement. But the courts apply this criterion restrictively. For example, in a recent case, the Federal Administrative Tribunal had to examine whether third parties – undertakings which had first lodged a complaint before the Comco – were significantly affected by a decision of the Comco following which it denied any abuse of a dominant position by two different companies in the market of events-ticketing (judgment of the Federal Administrative Tribunal dated 19 September 2012, pt 3.9). The Federal Administrative Tribunal considered that the third parties were not significantly affected in their market activities, as neither the position on the market of two companies nor the agreement concluded between them caused a substantial disadvantage that could have significantly affected their market activities.

The Federal Administrative Tribunal can produce evidences such as hearing witnesses or seeking expert reports. However, the case law shows that this was very rarely done, as the appeal file is usually very well documented, and the Federal Administrative Tribunal tends to render its judgments on that basis.

Concerning the effective judicial control carried out by the Federal Administrative Tribunal, one must say that it remains currently difficult to properly assess or to analyse its work, as the Federal Administrative Tribunal took office in January 2007. For the moment, the Federal Administrative Tribunal always carries out complex economic analyses thoroughly. Therefore its judicial control regarding competition law cases seems effective. The Federal Administrative Tribunal does not hesitate to overturn decisions of the Comco.

Currently, most of the judges of the Federal Administrative Tribunal do not have specific and in-depth qualifications on competition law. However, the establishment of qualified judges in competition law is one of the objectives of the current revision of the Cartel Act (see hereunder under “Reform proposals”).

As already said, the Administrative Federal Tribunal has always thoroughly examined the appeals it has dealt with. There is also an effective judicial control of the imposition of fines and their calculation. The largest fine ever issued for abuse of dominant position by the Comco – CHF 333m – was cancelled by the Federal Administrative Tribunal in January 2010. The fine on Publigroupe, of CHF 2.5m for refusal to deal and discriminatory practices, was confirmed by the Federal Administrative Tribunal in February 2010 (RPW/DPC 2010/2, p329, *Publigroupe*) and by the Federal Supreme Court on 29 June 2012.

The judgments of the Federal Administrative Tribunal may be challenged before the Federal Supreme Court. In proceedings before the Federal Supreme Court, one may not claim that the judgment of the Federal Administrative Tribunal is unreasonable, and claiming the fact-finding of the inferior instances to be incomplete or wrong is only permissible to a very limited extent. In principle, the Federal Supreme Court can only review the application of the Cartel Act.

In addition, the parties involved may at any time during and after appeal procedures request the Federal Council (Swiss government) to authorise agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco if, in exceptional cases, they are necessary for compelling public interest reasons (Art. 8 Cartel Act).

The judgments of civil courts may ultimately be challenged before the Federal Supreme Court. The above-mentioned developments regarding the request for exceptional authorisation to the Federal Council apply *mutatis mutandis*. If the legality of a restraint of competition is disputed before a civil court, the case must be referred to the Comco for an expert report. The Comco’s opinion is not binding to the civil judge.

Criminal sanctions

There are no criminal sanctions for cartel activities but only administrative sanctions (see “Civil penalties and sanctions” section).

However, anyone who wilfully violates an amicable settlement, a final and non-appealable ruling of the competition authorities or a decision of an appellate body is liable for a fine not exceeding CHF 100,000 (Art. 54 Cartel Act). Anyone who wilfully does not comply, or does not fully comply with a ruling of the competition authorities concerning the obligation to provide information, who implements a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings, is liable to a fine not exceeding CHF 20,000.

If the same matter is prohibited by the Swiss Criminal Code (e.g., destruction of a competitor’s plant), aggrieved parties may raise a civil claim for damages within the framework of the criminal procedure or separately, based on Art. 41 of the Swiss Code of Obligations. In principle, the judge in charge of the criminal procedure also rules on civil claims, except where the damage was not clearly determined in the request, or the damage calculation requires substantial efforts. The judgment of a criminal court as to the guilt and to the determination of the damage, and the provisions of the criminal law concerning criminal responsibility, are not binding upon a civil judge.

Cross-border issues

The Cartel Act applies to all concerted practices and agreements that have a direct, substantial and reasonably foreseeable effect within Switzerland (Art. 2 § 2 of the Cartel Act). Therefore, agreements concluded abroad, or conduct that takes place outside Switzerland but has such effects in Switzerland, may fall under Swiss jurisdiction. In May 2012 the Comco imposed a fine of CHF 156m on BMW AG, the parent company with registered offices in Germany, for restriction to parallel and direct imports, as the contracts with its authorised distributors in the EEA were prohibiting them from selling to customers outside the EEA. These unlawful provisions had an economic effect in Switzerland. With the *Gaba* decision, the Federal Administrative Tribunal confirmed the broad application of the effects doctrine and hence the territorial scope of the Cartel Act. Indeed, pursuant to the *Gaba* decision, the effect on Swiss territory must be of a particular type (whether of a specific kind or intensity) and the effect can be either direct or indirect, and potential or actual. Therefore, it is important for undertakings whose activities produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law rules for their agreements and practices.

Other than the Free Trade Agreement of 1972 between the EU and Switzerland (Art. 23 and 28) and the OECD Guidelines of 1995, on 17 May 2013 Switzerland and the EU signed an agreement concerning cooperation on the application of their competition law (the “Cooperation Agreement”). The Cooperation Agreement is the first of a “second generation” providing for the transmission of certain information without the consent of the undertakings concerned. The aim of the Cooperation Agreement is closer cooperation between the Comco and the EU Commission. By improving access to evidence, reducing administrative overlaps and ensuring due consideration of mutual interests, the Comco and the EU Commission seek to combat cross-border anticompetitive practices more effectively. The Cooperation Agreement was ratified by the Federal Parliament, and the EU Parliament ratified the Cooperation Agreement that entered into force on 1 December 2014.

The core element of the Cooperation Agreement is the intended exchange of specific, case-related information between the Swiss and EU competition authorities. A major change to the present status is the transmission of information and documents between the authorities even if the concerned company does not consent to the transmission, without a right to appeal and even outside an in-depth investigation. However, information submitted before the Comco under a leniency application may not be transferred without the consent of the applicant. Moreover the competition authorities must investigate the same or related conduct in order for the exchange to be admissible. The use of the information exchanged is limited to the enforcement of the competition laws of the EU and Switzerland. Like the exchange of information, the use of information is restricted to the same or related conduct.

The Cooperation Agreement will have to be taken into account in particular in the preparation of dawn raid situations and in the assessment of multi-jurisdictional leniency applications (i.e. whether or not to include Switzerland).

For the purposes of implementing the Cooperation Agreement, a new Art. 42b § 3 has been inserted in the Cartel Act, laying down the general requirements for sharing information with a foreign competition authority. Information may only be transmitted based on international agreements or with the consent of the undertakings concerned. The additional requirements mirror to a large extent those contained in the Cooperation Agreement. The revised Art. 42b § 3 merely sets out that the undertakings concerned are to be consulted before the transmission of information. Whether or not the exclusion of an *ex ante*-legal

remedy against an unlawful transmission of information is compatible with the Swiss Federal Constitution and the ECHR will be for courts to decide.

The Cooperation Agreement concerns solely cooperation with the EU Commission and not with the European national competition authorities. The Commission is, however entitled to inform the competition authorities of the EU Member States and the EFTA Surveillance Authority. Moreover, on an informal basis, the Comco and its Secretariat cooperate with various antitrust authorities in Europe, specifically national European authorities and the German *Bundeskartellamt*, as well as with the US antitrust authorities. This cooperation does not go beyond the exchange of non-confidential information, unless the parties to the proceeding have explicitly consented to an exchange of confidential information.

The Cartel Act provides for a specific regime with regard to investigations in the air transportation industry. Accordingly, the Comco may cooperate with the EU Commission on a formal legal basis.

Investigations, prosecutions and sanctions decided by antitrust authorities abroad have no binding effect on the Comco. Even if the EU regulatory framework and case law have often made significant inroads into Comco's practice, the Federal Supreme Court explicitly held that Swiss competition law must be interpreted independently from EU law.

Developments in private enforcement of antitrust laws

In Switzerland, third party private enforcement level is currently relatively low as regards follow-on claims as well as stand-alone claims. The most relevant reason is the difficulty in gathering evidence and the high costs related thereto. In comparison, lodging a complaint before the Comco leads to a free administrative procedure. Another factor is that, according to the prevailing doctrine, final consumers are not authorised to bring claims based on the Cartel Act. However, any consumer would have legal standing to bring a claim for damages under tort law. Finally, the short period of the statute of limitations for a claim for damages is an additional reason which explains this low level. Indeed, the limitation period for a claim for damages or reparations expires one year after the claimant is aware of both the complete damage and the identity of the injuring party, but in any case at the latest ten years after the restraint of competition has ended (Art. 60 of the Swiss Code of Obligations). The same rules apply regarding the claim for remittance of illicitly earned profits.

The legal standing of consumers' associations as regards private enforcement actions based on the Cartel Act remains unclear. Trade or consumer organisations possess legal standing provided they are undertakings under the Cartel Act (which means that they exercise a commercial activity) and are hindered in the process of competition. However, the issue of their standing to protect members' interests, as was the case under the former Cartel Act of 1962, remains disputed. In principle, the legal literature tends to recognise trade or consumer organisations' active legal standing with regard to actions for injunctions to terminate a restriction of competition, but not with regard to actions for damages incurred by their members. The new CCP recognises the active standing of associations and other organisations of national and regional importance to bring action in their own name against violations of the personality rights under Art. 28 CC of their members. Personality rights also include in principle economic rights and thus, at least in theory, trade or consumer organisations may claim for the prohibition of an existing or threatened violation of personality rights (for instance, prohibition of a boycott or a refusal to deal). Furthermore, it is currently not possible for a representative body to bring a collective follow-on claim

in Switzerland on behalf of consumers. These are additional factors which make private enforcement unattractive in Switzerland.

Concerning the gathering of evidence, pre-trial discovery is not available in Switzerland. Furthermore, an exchange of information between the Comco and the civil courts does not take place in general. It is therefore difficult to obtain any documents before the start of the proceedings. However, one should note that potential claimants are often in a position to gain access to the file of the Comco by requesting to be treated as a party in the administrative procedure. In practice, the Comco is generous in granting party status. As a party in the administrative procedure, the damaged party has access to the entire file. The damaged party can then use copies from the file to support its civil claim. This may result in a considerable facilitation of proof for civil competition actions in cases where an administrative procedure is pending or has already been terminated (follow-on actions). A potential claimant might be inclined to initiate an administrative proceeding first by filing a request with the Comco. Important information may, however qualify as trade business and remain inaccessible.

Interim remedies are available under Swiss law (Art. 261 to 269 CCP). Interim remedies focus on avoiding or terminating the restraint of competition. All appropriate and reversible measures for such interim execution are available (Art. 262 CCP), e.g. the interim obligation to enter into a contract or to grant admission to a trade fair. However, the interim payment of a sum of money is not possible and therefore, interim awards of damages are not available in Switzerland.

A new decision of the Federal Supreme Court shows a recent case of private enforcement in a stand-alone case regarding an abuse of a dominant position in the cheese market (4A_449/2012 dated 23 May 2013). At the request of the plaintiff – a cheese maker – the Federal Supreme Court confirmed that the company managing a cheese-ageing cellar with regard to the production of an AOC cheese had abused its dominant position by preventing the cheese maker from being admitted to the cheese-maturing cellar. The said company was then forced to admit the cheese maker to the cheese-maturing cellar and was compelled to pay damages. However, the damages were low as the plaintiff did not sufficiently prove the link between the abuse of the dominant position by the cheese company and the loss of earnings he had suffered. This case demonstrates once again the difficulty of proving facts for a plaintiff in a stand-alone case.

The Cantonal Court of Vaud also rendered an interesting decision in ordering a European sport federation to invite an athlete to one of its competitions as a recommendation issued by the sport federation, a Swiss domiciled association, not to invite athletes who could harm the events because of their doping offences from the past, was considered as infringing rules on abuse of dominant position (Art. 7 Cartel Act) and injuring athletes' personality rights (judgment of 24 June 2011, published in CaS 2011, 282).

Reform proposals

The highly controversial amendments to the Cartel Act, proposed by the Swiss Federal Council on 22 February 2012, were finally rejected by the Federal Parliament on 17 September 2014. The sweeping amendments would have introduced changes to the merger and restrictive practices regimes, as well as institutional changes for the Comco. It would have introduced the significant impediment to effective competition (SIEC) test in merger control, which has become the European standard for assessing deals, as well as ushering in new measures to facilitate follow-on litigation and reduce the members of the Comco.

Moreover the government proposal provided for the prohibition of *per se* hard-core restrictions to competition, such as horizontal agreements on prices, quantities and customers as well as a number of vertical restrictions, unless they could be justified on grounds of economic efficiency. Going forward it will be interesting to monitor the decision of the Federal Supreme Court in the *Gaba* case (please see hereunder § 3 on the overview of cartel enforcement activity during the last 12 months).

Most controversially, the proposed legislation aimed to force manufacturers and importers to pass on currency gains and to supply Swiss buyers at the most favourable price obtainable worldwide. As a result, international companies would be forced to sell their products at the same prices charged abroad.

The bill also provided for a potential reduction of fines imposed on undertakings if the undertaking shows that it implemented an effective competition compliance programme.

Moreover, if an undertaking had submitted notification of a restraint to competition before it took place, the bill stipulates that no sanction can be imposed on the undertaking if an investigation procedure is not opened by the competition authorities within two months of the notification.

Finally, the following provisions of the amendments, concerning private antitrust actions, could have had an impact on cartels: (i) the recognition of legal standing to final consumers; and (ii) the suspension of the statute of limitations for civil actions during an investigation of an alleged anticompetitive practice by competition authorities.

The draft amendments to the Cartel Act faced many objections from a broad range of Swiss stakeholders, especially concerning the proposed *per se* prohibitions on certain agreements that were viewed as too far-reaching. For this reason, and contrary to a parliamentary motion asking for the proposal of new amendments to the Cartel Act to aim at preventing the “high price island”, the Federal Council indicated on 12 November 2014 that it does not plan to prepare any new amendments to the Cartel. The Federal Council plans to maintain Swiss competitiveness through the support of measures concerning wider market-opening, as well as reforms of the internal market.



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